No. 150.

Brief of Morris for P. C. (mo.

BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS AND AFFIRM.

Filed Nov. 20, 1899.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1899.

No. 150.

HENRY F. WHITCOMB and HOWARD MORRIS,
as Receivers of the Wisconsin Central Company,
Plaintiffs in Error,

vs.

JOHN A. SMITHSON,
Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

HOWARD MORRIS,
THOMAS H. GILL,
Counsel.

EVENING WISCONSIN CO., PRINTERS, MILWAUKEE.

SUPREME COURT OF THE UNITED STATES.

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HENRY F. WHITCOMB AND HOWARD MORRIS, AS RECEIVERS OF THE WISCONSIN CENTRAL COMPANY,

Plaintiffs in Error,

vs.

JOHN A. SMITHSON,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS AND AFFIRM.

The defendant in error moves to dismiss the writ herein, basing the right upon two grounds:

1st. That no federal question is involved.

2nd. Because this Court has no jurisdiction of the cause as is shown by the record.

He also moves to affirm the judgment below for the reasons:

1st. That the writ is taken merely for delay.

2nd. That the jurisdictional question raised by the record is too frivolous to require argument.

The record shows an action for personal injuries against two defendants, the Receivers and another Railway Company; that the Receivers removed the action to the Federal Court, alleging diverse citizenship, federal receivership, sep-

arable controversies, collusive joinder of defendants to prevent removal, and no cause of action against the non-removing defendant.

The cause was remanded to the State Court because a joint action, at least in form. The Receivers stipulated to try the case in the State Court if allowed to answer therein. The case was tried to the conclusion of the plaintiff's evidence, when it was dismissed as to the defendant not joining in the removal and which was charged as having been collusively joined as defendant to prevent removal. Thereupon the Receivers, having thus become sole defendants and the action removable, sought by proper proceedings then to remove. That removal was denied and the judgment rendered was affirmed upon appeal by the State Supreme Court.

A.

The record shows that a right, privilege or immunity under the laws of the United States set up and claimed by the defendants below, to-wit, the right to remove the cause to the Federal Court for trial, has been denied to said defendants by the State Court.

That judgment is open to review in this Court.

R. R. Co. *vs.* Fitzgerald, 160 U. S., 556.

Stone *vs.* South Carolina, 117 U. S., 430.

Most of the argument of counsel for the defendant in error is directed to two points: First, that the remanding order was final and restored jurisdiction to the District Court of Ramsey County, Minnesota, to try and determine the cause. Second, that the stipulation of the Receivers, defendants in that case, to the trial in the State Court was binding and precluded any attempt at a subsequent removal.

The first point urged may be conceded, for the plaintiff in error here has not relied upon any question as to that order, in regard to the case in its then condition pending against both defendants. We believe, however, that there is much

more than mere argument in the suggestion of the brief on the merits now on file here, that inasmuch as the remand was made upon an erroneous view of the complaint, and as the cause of action was in reality sole and separable against the Receivers, and the case in fact a removable one under the law, the removal working a loss of jurisdiction in the State Court, such jurisdiction was not restored by the error of the remanding Court.

Upon the other point we submit that the defendants below acted in absolute accord with their stipulation to try that cause in the State Court and the suggestion of bad faith by either the Supreme Court of Minnesota or the counsel upon the other side, comes with poor grace in view of the conduct of the litigation by the defendant in error.

If, as counsel contends, the remanding order was final and binding upon these defendants below, where could the case be tried other than in the State Court? In so stipulating were not these defendants below but making formal announcement of an absolute right of the plaintiff that the defendants could not have altered in any way? Why, if counsel for the plaintiff in the State Court were in good faith, did they draw and procure that agreement when they knew that there could be no other Court of trial?

Moreover, were these defendants to be denied the right of saving error in the jurisdiction in that trial Court if it existed because they had stipulated that the case should there be tried? And what valid reason does the stipulation furnish that Court to refuse the proffered amendment to the answer setting up facts to show the lack of jurisdiction? Still that is the reason assigned for the refusal to permit such amendment.

It appears from the claim of counsel that because these defendants had stipulated to assure the plaintiff his absolute right to a trial in that State Court, they forsooth denied themselves the protection of a fair and errorless trial. But, we may have given too much importance to these inconsistencies,

as the question of this stipulation seems to be wholly foreign to a consideration of the reasons we urge here for a reversal.

Had these defendants below departed from their agreement, complaint of counsel might have had some color of foundation. But they did not. So far as the cause was made up at the time of the stipulation, it was tried as agreed therein.

It must be remembered that the plaintiff below selected and stated his cause of action, and chose his opponents. He selected both as responsible. The Receivers had no choice but to be impleaded with the other defendant company. The Receivers did not experiment with their case in the State Court. They were forced to remain there for trial, wasting their best efforts to be relieved. The plaintiff below was doing all the experimenting. He knew when he joined the Railway Company as a defendant, when he stated its negligence to be the failure to provide proper rules, while he submitted his evidence without a question upon that subject, all through, he knew what was expected to be the outcome. And hence, when the case had thus been changed from a joint cause of action against all, to a separate cause of action against these defendants below, when it had thus in form become as it had all the time before in fact been, a removable case, and only then, did these defendants move for a transfer of the jurisdiction. That stipulation, giving it the broadest scope claimed by the plaintiff in error, yielded up its binding force when the Railway Company defendant was dismissed. That joint action ended—became legally determined in the direction of the verdict. The case thereupon, in legal significance, became substantially a new action for removal purposes by reason of taking on its separable form. The stipulation was never intended to apply to an action not in being nor in contemplation of the Receivers when the stipulation was made.

That the action thus took new form for such purposes is announced by the doctrine of many cases in the Federal Courts.

Huskins *vs.* C. N. O. & T. P. R. Co., 37 Fed. Rep., 504.
Kanouse *vs.* Martin, 15 Howard, 198.
Evans *vs.* Dillingham, 43 Fed. Rep., 177.
Yarde *vs.* B. & O. R. Co., 57 Fed. Rep., 913.
Mattoon *vs.* Reynolds, 62 Fed. Rep., 417.
Cookerly *vs.* R. Co., 70 Fed. Rep., 277.
Yulee *vs.* Vose, 99 U. S., 539.
Powers *vs.* C. & O. R. Co., 65 Fed. Rep., 129.
Powers *vs.* C. & O. R. Co., 169 U. S., 92.

Moreover, it would seem upon a fair reading of the stipulation, that it was never the purpose of either party thereto that it should have the vast significance and weight which the counsel for the defendant in error, since the trial, has labored to give it. It contains no language capable, by reasonable construction, of establishing a consent to try the cause in the State Court at all events. It is rather and was always by both parties intended to be merely a stipulation of trial *at a certain term* that the plaintiff might not be prejudiced by delay. The great consideration which plaintiff's counsel sought in insisting upon it was to preclude the defendant Receivers from contesting the payment of the judgment if any recovered, which must be thereafter presented for allowance in the original action in which the Receivers had been appointed. Please note that its language is "hereby stipulate and agree that the plaintiff shall have a trial of this case *in said Court at the June term thereof 1896.*" Note again that it was made upon the *4th day of June, 1896*, when the said June term was either pending or at hand. Is it not hypercritical to contend that the plain intent and meaning of the whole document is to obviate a term's continuance, particularly when we remember that under the then circumstances of the case no trial could possibly have been had in any other Court? More force would follow counsel's argument if this stipulation were a bald agreement to submit to the jurisdiction of the state tribunal as he now seeks to construe this plain and unambiguous language.

Can the language of this stipulation be tortured into a waiver of the privileges of removal which the Receivers sought to enforce? If the suit was in fact removable in the first instance, though the attempt to change the forum was ineffectual, the jurisdiction had departed from the State Court. When therefore the defendant Receivers were forced to trial in that tribunal, though they were not able to obtain review of the order of remand, because non-appealable, any stipulation they might make, any steps they might take, in protection of their legal rights, short of an express voluntary renunciation of their right, ought to militate against them no more than similar conduct in a forced trial in a State Court, because kept there by the error in declining the proper application to remove. The principle is precisely the same.

Ry. Co. *vs.* Dunn, 122 U. S., 516.
Removal Cases, 100 U. S., 457.

The rule should be, and we believe it is, that to constitute such waiver, plain, unequivocal language to the very point is necessary.

B.

In the brief upon the merits, now on file, we have argued that the right of removal upon the dismissal of the action as to our co-defendant below, became absolute, either by way of amendment to the original petition or by new petition and bond for that purpose.

We have relied, in support, upon the cases in this Court and the inferior courts of appeal, cited in the brief.

To meet this contention, in the brief upon this motion, and for the purpose of showing that the right of removal did not then accrue, counsel for the defendant in error urges that our authorities upon this point turn altogether upon the fact that the amendments of ad damnum clauses, the dismissal of joint defendant and other changes which have been held to convert

a non-removable into a removable cause, have been the result of the *voluntary* action of the plaintiff before actual trial had commenced.

If this were so, we can perceive no difference in principle as applied to the case at bar. The defendant Receivers had sought a removal, setting up no cause of action against the co-defendant, an actual separable controversy, if any, and collusive joinder to prevent removal. The cause was remanded and the order was not subject to review. They were forced to trial, and proceeded until the correctness of the allegations in their petition to remove were established by the dismissal of the co-defendant.

The facts upon which all concede that the removal would have been incontestible thus became established. Now, so far as the rights of the Receivers were concerned, how could they be more bound in principle by the necessity of proving the correct facts, than if the plaintiff below had conceded them without actual proof and had entered a voluntary non-suit before, or at any preceding step of, the trial? If the Receivers had kept their co-defendant in the trial, or had prevented the plaintiff from dismissal, it might well be claimed they ought not to be allowed to profit thereby, for they might thus come within the rule condemning the experiment of a trial in the State Court. The plaintiff had able and astute counsel, soon to be a member of the Supreme bench of his state, and we are confident he must always have known that by the rules of the law no cause of action was stated against the defendant Railway Company. Moreover, notwithstanding any possible doubt of the validity of his present judgment, counsel did not think it worth while to question the conclusions in that respect of the trial Court by an appeal, finally to determine the value of his complaint.

The very foundation premise of counsel's argument, however, fails. In the decisions covering the point raised, the right to remove becomes vested and available whenever the proper conditions are reached, even after the lapse of the time

fixed by the removal act, viz., after the time to plead, answer or demur.

In Cookerly *vs.* Ry. Co., 70 Fed. Rep., 277, after the plaintiff had rested, an involuntary non-suit was granted as to one defendant, and upon an amended complaint, removal was had by the defendant Railway Company.

In Yulee *vs.* Vose, 99 U. S., 539, the petition to remove was filed after a severance of causes of action by decision of the Court of Appeals in New York reversing the judgment of the lower Courts.

The plaintiff had full notice in the trial Court that the Receivers regarded the case in the beginning as removable by them, and their subsequent course being never inconsistent, the plaintiff proceeded at his peril.

To sum up briefly, we submit that the motion to dismiss and affirm should be denied for the reason that it does involve a federal question, to-wit, the right of removal; because, being a writ of error to review the judgment of the highest Court of the State of Minnesota, denying the plaintiffs in error the right of removal, this Court has jurisdiction; because if this Court has such jurisdiction, the Courts of Minnesota have not; and because it is not manifest that the writ is taken merely for delay, or that the question of jurisdiction is too frivolous for argument.

November, 1899.

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